

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of ATEC Associates, Inc.
Administrative Penalty Order Dated
February 17, 1995.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 19, 1995, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. The record remained open for receipt of posthearing briefs. The record closed on May 1, 1995, with the receipt of a brief from each party.

Jake M. Holdreith, Oppenheimer Wolff & Donnelly, 332 Minnesota Street, Suite 1700, St. Paul, Minnesota 55101-1313, appeared on behalf of ATEC Associates, Inc. (ATEC). Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Department of Health (Department).

Based on the testimony, records, and filings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. A Notice of Intent to perform asbestos abatement work was filed with the Department on July 27, 1994. The asbestos removal was scheduled to take place at the Star Tribune Building, 425 Portland Avenue, Minneapolis, between August 15, 1994, and September 30, 1994. The times when asbestos containing material (ACM) would be disturbed are indicated as the 7:00 a.m. to 3:30 p.m. shift. Exhibit B. The Notice indicated that the ACM work would be performed by Abatement Services, Inc. (ASI). The air monitoring would be performed by ATEC.

2. Because asbestos fibers can become airborne and, if inhaled, can cause health problems, precautions are required when ACM is removed. The area in which ACM is performed must be isolated from occupied areas of a building. Abatement workers must wear protective clothing. Air sampling outside the containment area must be performed to ensure that asbestos does not escape the containment area.

3. ASI conducted asbestos removal relevant here on the west side of the fourth floor of the Star Tribune Building starting August 31, 1994, and was concluding

that work on September 2, 1994. The west side of the fourth floor of the Star Tribune Building has a number of offices at the north end, a narrower line of offices toward the south, and an large group of offices at the south end. The offices at the south end are occupied by the Star Tribune's classified advertising staff. ASI's asbestos removal extended from the area adjacent to the north end offices, occupied all the office space in the middle of the west side, and ran along the exterior of the office space around the southwest corner. Occupied work spaces were adjacent to the north end and south end of the containment area. Once the fourth floor work was completed, ASI moved to other parts of the building to conduct other ACM removal.

4. After the work shift on September 1, 1994, ATEC had five sample collectors in place outside the containment area on the fourth floor. Three of the collectors were located outside the north end of the containment area. The remaining two collectors were located at the south end of the containment area. Both areas were occupied on September 1 by Star Tribune employees not engaged in abatement work. The collectors at the south end of the building were located in the south elevator lobby and at the furthest end of the enclosure. The south elevator lobby is adjacent to the classified advertising area. The placement of the collectors was appropriate for the amount of area to be covered by each sample. The collectors were in place overnight.

5. Twenty-eight ASI employees engaged in the final cleanup activities on the fourth floor on the morning of September 2, 1994. Brian Blesi, Project Manager for ATEC, arrived at the Star Tribune Building at 7:30 a.m. on September 2. David Davis, also of ATEC, arrived one half hour later. Two Star Tribune employees informed Blesi that dust and an acrid smell were present on the fourth floor in the classified advertising section. Blesi investigated the conditions. The dust was black particulate matter and was present throughout the occupied area of the fourth floor. Blesi concluded that the dust came from ductwork outside the containment area. That ductwork had been cut and sealed to prevent egress of asbestos from the containment area. Blesi believed the dust was shaken loose by the effect of using a reciprocal saw on the ductwork to cut it and the effect of shutting down the air flow and restarting it. The acrid smell arose from grinding activities to remove adhesive pads inside the containment area. Blesi directed that the doors be opened at the roof, in the stairwell, and on the west side of the fourth floor. The effect of this action was to flush the fourth floor with air exiting to the outside. The air flow was concentrated at the south elevator lobby. This began shortly after 9:00 a.m. and continued throughout the morning. The flow of air was noticeable.

6. At noon on Friday, September 2, Davis analyzed the overnight samples from outside the enclosure. Four of the five samples tested below 0.01 fibers per cubic centimeter (< 0.01 f/cc). When first examined, sample number 773294 showed a content of 0.021 f/cc. Sample number 773294 came from the south elevator lobby. Davis analyzed the sample again and arrived at a content of 0.017 f/cc. Davis used the phase contrast microscopy (PCM) method of sample analysis. This method requires the analyst to count the number of fibers in each field of the sample (for a total of 100 fields) and perform a calculation to determine the number of fibers per cubic centimeter. The PCM method cannot distinguish between fibers from asbestos and other sources, such as fiberglass. Davis brought the sample to Blesi, who analyzed it

and arrived at a content very close to 0.017 f/cc. Blesi analyzed the sample using 200 fields to ensure an accurate result with the volume of the sample. Blesi noted that many of the fibers appeared to be large and opaque, suggesting that they might be fiberglass, not asbestos. Blesi's analysis was conducted at 2:30 p.m. on September 2.

7. Immediately after conducting his analysis of the sample, Blesi looked in the area of the fourth floor occupied by Star Tribune employees. There were no employees present and no evidence to suggest that anyone remained in the area. The airborne dust noted at 9:00 that morning was gone. Blesi entered the enclosure at 3:30 and inspected the area. The abatement tasks inside the enclosure were completed. The barriers were intact, including those adjacent to the area where the > 0.01 f/cc sample was taken. Blesi completed his inspection at 4:20. The ASI workers left soon after. Blesi noted that the plaster ceiling in the elevator lobby (directly above the > 0.01 f/cc sample) was cracked. Building records show that ACMs are located in that area.

8. Blesi believed that, in his professional judgment, the flushing of air through the classified advertising area and the south elevator lobby removed any airborne asbestos particles that had been present on Friday morning. Blesi believed that, in his professional judgment, evacuating other areas of the Star Tribune building outside the classified advertising area was not necessary to protect public health. He also believed that there would be no asbestos present outside the enclosure after Friday at noon, due to the termination of asbestos removal activities in inside the enclosure and the flushing of air on Friday morning.

9. After conducting his inspection, Blesi set up the pumps for clearance tests inside the enclosure. The pumps draw air through a fabric filter to provide samples of particulate matter in the air. Samples were collected at several times within the enclosure from 5:30 p.m. to 8:00 p.m. on September 2. At 10:30 p.m., Blesi set out a sample collector in the south elevator lobby where the > 0.01 f/cc sample had been. Blesi left the site at 10:45 p.m. on September 2.

10. At 7:30 a.m. on Saturday, September 3, 1995, Blesi collected the sample he left in the elevator lobby on the fourth floor of the Star Tribune building. That sample tested < 0.01 f/cc. No further action was taken by Blesi or ATEC. No nonabatement personnel were present in the classified advertising area when Blesi arrived.

11. On September 6, 1994, Daniel Locher of the Department's Asbestos Abatement Unit, visited the Star Tribune Building to inspect the abatement work being conducted there. ASI was preparing the third floor for asbestos removal. ATEC employees were in the basement, where their records were being kept. Locher reviewed those records and noted all the applicable procedures were complied with, except for the response to the > 0.01 f/cc sample. Exhibit C (No. 74). Locher's notes on the discussion with Blesi state:

The sample was collected on Thursday, Sept 1st, 1994 and wasn't even given a response action. Mr. Blesi stated that He was going to TEM [Transmission Electron Microscopy] the sample - but, still as of

9/06/94 - he had not taken the sample to a TEM lab. I reminded him of the importance of getting this sample to a TEM lab (ASAP). He stated that he would do it today - 9/06.

One of the reasons of which he stated why he did not TEM sample # 773294 was because the ductwork activity most likely contributed to the 0.017 f/cc level, and this was not the result of the asbestos removal activity. I asked him - "did you ever consider any remote possibility that this sample might be the result of a fiber release episode" - and he stated again, that it was most likely due to the ductwork removal adjacent to the asbestos removal area.

Exhibit C, at 7.

Locher did not suggest any corrective measures that Blesi should take in response to the > 0.01 f/cc sample.

12. On September 9, 1994, Locher called Blesi and inquired about the results of the TEM analysis on the > 0.01 f/cc sample. Blesi stated that the sample had not been sent out for analysis. On September 13, 1994, Blesi called Locher to inform him that the result was available. The TEM test result was 0.028 f/cc.

13. Based on the > 0.01 f/cc sample, Blesi recommended to the Star Tribune that the elevator lobby area be subject to ACM removal. The Star Tribune accepted that suggestion and the lobby area was subjected to asbestos abatement on September 17-18, 1994. The air samples taken adjacent to the enclosure of the elevator lobby on those dates showed no samples > 0.01 f/cc. The clearance testing in the lobby after the abatement showed no samples above the clearance level of > 0.01 f/cc.

14. Based on the inspection and TEM test result, the Department convened a forum of staff to determine if any action was warranted. The forum concluded that an administrative penalty order was appropriate. The forum determined that ATEC violated Minn. Rule 4620.3500, subpart 2(B) by failing to:

- a) submit immediately for transmission electron microscopy (TEM) analysis indoor air sample #773294 collected on September 1, 1994, which indicated an ambient air level of 0.017 fibers per cubic centimeter of air (f/cc). The sample was submitted for analysis on September 12, 1994;
- b) evacuate the occupied area immediately adjacent to the abatement area location when September 12, 1994 TEM analysis indicated an asbestos fiber concentration in the ambient air outside the abatement on September 1, 1994, was 0.028 f/cc;
- c) take corrective actions such as thorough cleaning of the affected areas; and

d) collect five air samples in the occupied area immediately adjacent to the abatement area location to show the fiber levels no longer exceed the 0.01 f/cc limit following the corrective actions.

Exhibit J, at 2.

15. After reviewing ATEC's response to the forum's finding, the Department issued an administrative penalty order levying a nonforgivable fine of \$7,500. The forum prepared the order and concluded the fine was appropriate due to "the potential for serious harm ... based on the presence of asbestos fibers in the air of an occupied building." Exhibit L, at 3. The fine was considered appropriately nonforgivable because:

ATEC Associates, Inc. failed to evacuate individuals or take alternate steps outlined in Minnesota Rules, part 4620.3500, subpart 2, items B and C, when there was evidence of a fiber release and a potential for harm to public health.

Exhibit L, at 4.

16. The Department calculated the base penalty at \$5,000 for the following reasons:

Potential for harm is serious:

- Air sample #773294, collected on September 1, 1994, exceeded the Minnesota indoor air standard of 0.01 fibers per cubic centimeter of air (f/cc) with a result of 0.017.
- Transmission electron microscopy (TEM) analysis of the sample identified asbestos fibers with a result of 0.028 f/cc.
- An asbestos fiber release did occur on September 1, 1994, and there was endangerment to public health.
- ATEC Associates failed to perform corrective measures when there was an actual risk as the result of the exposure to individuals in the affected area.

Deviation from compliance is serious:

- No attempt was made to evacuate the building or isolate the area where the fiber release occurred, nor were the alternate steps followed as outlined in Minnesota Rules, part 4620.3500, subpart 2, items B and C.
- No recleaning or collection of five air samples was performed following the fiber release.
- No immediate actions were performed by ATEC Associates, Inc. to ensure that the affected area was properly decontaminated and tested.

Exhibit L, at 5.

17. The base penalty was adjusted by the Department by adding an additional 50% for the willfulness of the violation. The basis for the addition was stated as follows:

The violation was willful since ATEC Associates, Inc. chose to deviate from standard procedures when there was knowledge that such conduct was illegal. ATEC Associates primary role is to protect the occupants of the building. Asbestos related activities continued even though ATEC Associates Inc. knew of the elevated fiber levels on September 1, 1994.

Exhibit L, at 7.

18. The Department served the administrative penalty order on ATEC by certified mail on February 17, 1995. Exhibit N. The order contained a corrective order requiring ATEC to notify its supervisors of the violation, have the supervisors acknowledge that notification, and submit a plan for action in the event of future sample results > 0.01 f/cc. The order also contained a nonforgivable fine against ATEC of \$7,500. ATEC appealed the administrative penalty order by letter dated March 15, 1995. Exhibit O. The Department issued a Notice of Hearing in this matter on March 24, 1995.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Department of Health and the Administrative Law Judge have jurisdiction of this matter pursuant to Minn. Stat. § 144.991, subd. 5, and Minn. Stat. § 14.58.

2. Minn. Rule 4620.3500, subp. 2A sets a clearance level of 0.01 f/cc for air adjacent to an asbestos removal site. Sample number 77294 exceeded the applicable clearance level with a level of 0.017 f/cc.

3. The area adjacent to the location where the clearance level was exceeded was not occupied from 2:30 p.m. on September 2, 1994, to 8:30 a.m. on September 3, 1994.

4. Flushing the fourth floor classified advertising section with air leading directly outside the Star Tribune building was a “corrective measure” within the meaning of Minn. Rule 4620.3500, subp. 2B.

5. ATEC failed to take five samples to determine if the air in the area adjacent to the asbestos removal are met the < 0.01 f/cc clearance level as required by Minn. Rule 4620.3500, subp. 2B. This failure held only a minor risk of potential for harm for purpose of calculating a penalty under Minn. Rule 4620.3500, subp. 2B.

6. The one sample taken by ATEC in the area adjacent to the asbestos removal area was a serious deviation from compliance with the applicable rules for the for the purpose of calculating a penalty under Minn. Rule 4620.3500, subp. 2B.

7. An administrative law judge can only recommend a change in the penalty amount if the judge determines that, under the factors set out in Minn. Stat. § 144.991, subd.1, the assessed amount of the penalty is unreasonable. Minn. Stat. § 144.991, subd. 5(c). Under the circumstances of this case, and assessing ATEC’s violation under Minn. Stat. § 144.991, subd. 1 for:

- (a) the willfulness of the violation;
- (b) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (c) the history of past violations;
- (d) the number of violations;
- (e) the economic benefit gained by the person by allowing or committing the violation; and
- (f) other factors as justice may require;

the penalty amount imposed in the Administrative Penalty Order of \$7,500 is unreasonable.

8. Based on the factors in the foregoing Conclusion, a nonforgivable penalty in the amount of \$1,000 is reasonable.

9. The requirements of the corrective order are reasonable.

Based on the foregoing Conclusions of Law and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge make the following:

RECOMMENDATIONS

1. That the Commissioner affirm the requirements of the correction order issued as part of the Administrative Penalty Order issued against ATEC on February 17, 1995.

2. That the Commissioner modify the penalty portion of the Administrative Penalty Order to impose a nonforgivable fine of \$1,000.00 on ATEC.

Dated: May __, 1995.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

This Report is a Recommendation, not a final decision. Pursuant to Minn. Stat. § 144.991, subd. 5(e), the Commissioner must wait five (5) days before issuing a final decision in this matter. Should the affected party wish to submit comments to the Commissioner, those comments should be directed to Commissioner Anne M. Barry, 925 Delaware Street S.E., Minneapolis, Minnesota 55459-0040.

MEMORANDUM

ATEC has maintained throughout its appeal that a sample tested by the PCM method showing 0.017 f/cc does not violate the clearance standard of Minn. Rule 4620.3500, subp. 2A. ATEC points to confidence levels in sampling as a basis for believing that a standard of 0.01 means any amount up to 0.01999999999. ATEC asserts that not specifying the standard to the third decimal place renders the standard vague.

Confidence levels are used to determine a result from a range of samples. The rules for asbestos sampling outside the enclosure do not blend a range of samples. Rather, each sample must meet independently the 0.01 f/cc standard. The U.S. Environmental Protection Agency advisory on asbestos removal is very clear that any one sample result higher than 0.010 f/cc means the entire site fails and corrective action

must be taken. The actions taken by ATEC at the time the sample was analyzed demonstrate that such a test result does violate the clearance standard and ATEC was aware of that fact. The standard is unambiguous and one sample measured by ATEC on September 2 exceeded that standard.

Since one sample exceeded the clearance standard, the issues presented by this case are whether the actions taken by ATEC comply with the actions required by rule and what penalty is appropriate if ATEC's actions do not comply with the rule.

When a sample measures > 0.01 f/cc by the PCM method from an occupied area adjacent to an abatement site when abatement work is ongoing, Minn. Rule 4620.3500, subp. 2B offers one response and Minn. Rule 4620.3500, subp. 2C offers another. Subpart 2B requires that the contractor "evacuate any occupied area immediately adjacent to the abatement area ... to protect members of the public and nonabatement personnel." The subpart goes on to state "evacuated areas shall not be reoccupied until corrective measures have been taken and documented and each of five samples collected in accordance with subpart 3 show that fiber levels no longer exceed the clearance air level."

ATEC became aware of the sample test result at approximately 2:00 p.m. on Friday, September 2, 1994. At that time, Blesi checked the area where nonabatement personnel had been working that day. The area was unoccupied. Computers were shut off and there was no suggestion that anyone was still working. Blesi was aware that the Labor Day weekend was beginning and nonabatement personnel were not likely to be present. Blesi could have made an attempt to notify building management that the area should not be reentered. There is no evidence in the record that the classified advertising area was occupied between 12:30 p.m. on Friday afternoon and 8:30 a.m. on Saturday morning.

Under subpart 2B, the area cannot be reoccupied until corrective action is taken and five samples test within the clearance level. The air flushing undertaken to remove dust generated outside the enclosure served to remove the airborne asbestos fibers. While this is not a method ATEC would have chosen if the test result had been learned earlier, the fact remains that the flushing occurred. When Blesi became aware of the test results he made the decision, based on his professional judgment, to rely upon the flushing to remove any airborne fibers in the classified advertising area and the south elevator lobby. The Department points out that moving air can disturb sources of asbestos and result in more airborne fibers. While that is true, that argument assumes that the asbestos is coming from the containment area. Blesi conducted aggressive tests within the containment area and the results were below the clearance level. If asbestos was being generated by the flushing (and there is no evidence in the record that there was), the asbestos was coming from outside the containment area.

To test for the presence of asbestos after the actions on September 2, Blesi put out one sample in the same approximate location as the > 0.01 f/cc sample. Subpart 2B requires five samples be taken and all show a result below the clearance level before the area can be reoccupied. One sample does not meet the rule requirement.

Blesi did have reasons for setting out one sample. The containment area was not the likely source of the asbestos. The space affected by dust is usually covered with one sample. With the flushing of air, whatever number of samples had been put out were likely to come back with results below the clearance level. None of these reasons overcomes the purpose of the rule, which is to provide a margin of safety to ensure that persons working in the adjacent area are not exposed to airborne contaminants. One sample is not adequate to protect public health. Taking only one sample before allowing the area to be reoccupied is a serious deviation from compliance with the requirements of Minn. Rule 4620.3500, subp. 2B.

Minn. Rule 4620.3500, subp. 2C, allows a contractor to retest a sample above the clearance level using the TEM method if the contractor "has good reason to believe that elevated fiber levels are the result of nonasbestos dust." The contractor must immediately send out the sample for analysis and may delay evacuation until the results are known. There is no evidence in the record that ATEC sought to delay evacuation of the classified advertising area. The TEM analysis came at the suggestion of the Department inspector. ATEC never relied upon subpart 2C to support its actions.

In calculating the appropriate penalty, the Department indicated that the violation was serious because asbestos fibers were present in an occupied building. The Department presented no substantial evidence that nonabatement employees or other persons were present in the classified advertising area from 2:30 p.m. on September 2, 1994, to 7:30 a.m. on September 3, 1994. The Department relied upon the contractor's statement that the building was occupied twenty-four hours a day. The Department's own inspector testified that a release on the fourth floor would not require evacuation of the other floors of the building. Given the layout of the Star Tribune building, the only area of concern was the classified advertising area. There were no persons in the classified advertising area on the afternoon and evening of September 2 and on the early morning of September 3, which is the period of time from when the first analysis of a single sample showed a result > 0.01 f/cc until the second sample in the same area showed a result below that level.

The only sample taken outside the containment area after 2:30 p.m. on September 2 indicates that there were no airborne asbestos fibers present in that area over that time period. The record demonstrates that ATEC acted properly until Blesi became aware of the > 0.01 f/cc sample at 2:30 p.m. Therefore, the Department cannot base its penalty upon the presence of asbestos before 2:30 p.m. on September 2. The one sample taken afterward showed fiber concentrations below the clearance level. Flushing the dust-laden air provided additional assurance contaminated air was removed. There is no evidence of a risk to persons from asbestos fibers in the air after 2:30 p.m. on September 2.

In arriving at a base penalty of \$5,000, both the potential for harm and deviation from compliance were determined to be serious. In assessing the potential for harm as serious, the Department cited the TEM test result of sample number 773294, endangerment to public health, and ATEC's failure to take corrective measures. The TEM result is not relevant to the penalty calculation. There is no evidence of a release

after ATEC was aware of the > 0.01 f/cc sample. No nonabatement personnel were present in the classified advertising area of the Star Tribune building. The correct assessment of the potential for harm is minor.

In assessing ATEC's deviation from compliance as serious, the Department cited no effort to evacuate the building, isolate the area, or use alternative steps (subpart 2C); no immediate recleaning or collection of five air samples; and no immediate actions to ensure the area was decontaminated and tested. The affected area was already unoccupied. Blesi immediately inspected the affected area to determine if anyone was present. He noted that air was flowing through the affected area to the outside. Blesi entered the enclosed area and examined the barriers for breaches. Soon thereafter, he tested the air inside the enclosure for fiber content and determined that the fiber content was below the clearance level. Blesi set out one sample collector to ensure that no more asbestos was present and arrived before any nonabatement personnel were likely to enter the area. Blesi tested the one sample he collected and determined that the fiber content in the classified advertising area was below the clearance level. ATEC did fail to put out five samples as required by rule. This deviation from compliance reduced the ability of ATEC to determine the affected area was below the clearance level before the area was reoccupied. This deviation is serious. The circumstances that would tend to moderate the level of deviation are that the sample collector was placed in the same location that the noncompliant sample originated from, the area covered by that sample was within the appropriate measure of what one sample would ordinarily be expected to cover, and final cleanup inside the enclosure had been performed. However, placing a single sample collector raises the potential that a release of asbestos or the presence of asbestos from another source will not be discovered before the area is reoccupied by nonabatement employees. Placing five collectors is a protective measure that provides assurance that releases will be detected and appropriate remedial measures can be taken.

Since the appropriate measure of the potential for harm is minor and the appropriate measure of the deviation from compliance is serious, the range for the base penalty is from \$2,000 to \$500, according to the table on the Department's penalty calculation worksheet. A penalty at the lower half of the range is consistent with the degree of noncompliance in this case.

The Department increased its base penalty by 50% for ATEC's willfulness in violating Minn. Rule 4620.3500, subp. 2B. The notation on the Department's worksheet shows that the Department believed ATEC knew of elevated fiber levels on September 1, 1994 and continued with abatement activities nevertheless. This belief is not supported by evidence in the record. At the time ATEC learned of the one noncompliant sample, the removal had been completed and final cleanup was underway. Testing done soon after the discovery of that sample showed no ambient fiber content within the enclosure above the clearance level. There was no indication that ATEC proceeded with knowledge that its actions violated any rule of the Department. The facts presented ATEC on the site do not fit neatly within the framework of Minn. Rule 4620.3500, subp. 2B. Increasing the penalty for a willful violation is unreasonable.

Under the Department's method of calculation, a penalty based on a violation that is neither repeated nor serious must be forgivable. The violation in this matter was not repeated but, as discussed above, the deviations from compliance rendered it serious. Therefore, the penalty must be nonforgivable.

S.M.M